Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

SOUTHEASTERN MARITIME COMPANY and GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

v.

ALONZO BROWN and DIRECTOR, OFFICE OF WORKERS' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED FOR REVIEW

Whether annual adjustments under § 10(f) of the Longshore and Harbor Worker's Compensation Act accrue from the date of injury, and not from the date the claimant is found to be permanently, totally disabled.

PARTIES TO PROCEEDING

The case caption contains the names of all parties to the proceeding.

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CITATIONS TO OPINIONS AND ORDERS BELOW

On January 19, 1994, Administrative Law Judge Aaron Silverman issued a Decision and Order wherein he found Claimant to be entitled to permanent, total disability from January 29, 1987. The opinion of the Administrative Law Judge is attached hereto as Appendix C. On August 17, 1994, Administrative Law Judge G. Marvin Bober issued a Decision and Order on Motion for Reconsideration denying Employer/Carrier's request that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury. The Decision and Order on Motion for Reconsideration is attached hereto as Appendix D. On September 12, 1996, the Benefits Review Board issued an Order affirming the decision of Administrative Law Judge Bober. The Decision and Order of the Benefits Review Board is attached hereto as Appendix E. On September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer/Carrier's Petition for Review of the decision of the Benefits Review Board on the grounds that a Suggestion for Rehearing *En Banc* was required. The opinion of the Eleventh Circuit is attached hereto as Appendix A. On November 26, 1997 the Eleventh Circuit Court of Appeals denied Employer/Carrier's Suggestion for Rehearing *En Banc*. The Eleventh Circuit's Order is attached hereto as Exhibit B.

STATEMENT OF BASIS FOR JURISDICTION

The Order sought to be reviewed was entered by the Eleventh Circuit on September 10, 1997. The Order

entered by the Eleventh Circuit denying Petitioner's Suggestion for Rehearing *En Banc* was entered on November 26, 1997. This Court has jurisdiction over appeals from Orders of the United States Courts of Appeals pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THE CASE

"Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on October 1, as determined under section 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum." *33 U.S.C.§ 910(f).*

STATEMENT OF THE CASE

Introduction

The issue in this case is whether or not the Eleventh Circuit Court of Appeals erred in its affirmation of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981) (holding that § 10(f) of the Longshore and Harbor Workers' Compensation Act requires that the Claimant receive annual adjustments beginning from the date of injury rather than the date the claimant is found to be

permanently, totally disabled) in light of the fact that the *Holliday* decision has subsequently been reversed by the Fifth Circuit and rejected by the Second and Ninth Circuits on the grounds that *Holliday* ignores the plain meaning of § 10(f).

Statement of Facts

1. Claimant was injured on August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye; experienced pain in his neck and lower back; and subsequently experienced residual psychological problems. (See Appendix C, pp. App.5-6).

2. Pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, this matter came before a United States Department of Labor Administrative Law Judge for determination of whether or not Claimant was entitled to permanent total disability. (See Appendix C, p. App.5).

3. On or about January 19, 1994, the Honorable Aaron Silverman issued a Decision and Order wherein he found Claimant to be entitled to permanent total disability from January 29, 1987. (See Appendix C, pp. App.7-8).

4. On or about February 14, 1994, Carrier filed a Motion for Reconsideration asserting that the Decision should be clarified to provide that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury.

5. On or about August 17, 1994, the Honorable G. Marvin Bober issued a Decision and Order on Motion for Reconsideration in which he acknowledged that *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), which provided that all Section 10(f) cost of living adjustments accrue from the date of injury, had been overruled by the 5th Circuit in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) on the grounds that under the plain meaning of § 10(f) only the cost of living adjustments provided were for permanent total disability. However, pursuant to *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981), Judge Bober found that since *Phillips* was not decided until after the 11th Circuit broke from the 5th Circuit, *Holliday* is still binding precedent in the 11th Circuit. (See Appendix D, pp. App.10-15).

6. On or about September 13, 1994, Employer appealed the decision of Administrative Law Judge Bober to the Benefits Review Board.

7. On or about September 12, 1996, the Benefits Review Board affirmed the decision of Administrative Law Judge Bober. (See Appendix E, pp. App.16-17).

8. On or about October 28, 1996, Employer timely filed a Petition with the Eleventh Circuit Court of Appeals for Review of the Order of the Benefits Review Board.

9. On or about September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer's Petition stating, in part "Notwithstanding petitioner's arguments regarding the wisdom of *Holliday* or the singularity of its

holding relative to other circuits, it is still binding precedent in our circuit" until such time as there is *En Banc* consideration. (See Appendix A, pp. App.1-2).

10. On or about November 26, 1997, Employer timely filed a Suggestion for Rehearing *En Banc*.

11. On or about November 26, 1997, the Court of Appeals denied Employer's Suggestion for Rehearing *En Banc*. (See Appendix B, pp. App.3-4).

Reasons for Granting the Writ

The Eleventh Circuit's affirmation of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), a decision reversed by the Fifth Circuit and rejected by Second and Ninth Circuits, has subverted the plain meaning of § 10(f) of the Longshore and Harborworkers' Compensation Act and placed the Eleventh Circuit at odds with her sister circuits.

Section 10(f) of the Longshore and Harborworkers' Compensation Act provides:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum.

In *Holliday v. Todd Shipyards*, 654 F.2d 415 (5th Cir. 1981), prior to the split between the Fifth Circuit and the Eleventh Circuit, the Fifth Circuit approved, without analysis, an agreement between the parties whereby the claimant's permanent total disability adjustment rate would include all intervening § 10(f) adjustments occurring during the period of his temporary total disability.

In 1981, after the *Holliday* decision was issued, the Eleventh Circuit split from the Fifth Circuit and held that "the decisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court. . . . " *Bonner v. City of Pritchard*, 661 F.2d 1206 (1981). Thus, *Holliday* became binding precedent in the Eleventh Circuit.

Subsequently, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990), the 5th Circuit reversed the *Holliday* decision. In support of their decision to overturn *Holliday*, the 5th Circuit first looked to the plain meaning of section 10(f) and stated, "In section 10(f), those words are plain and unambiguous: The only adjustments provided by the section are increases to 'benefits payable for *permanent* total disability' (emphasis added). There is no hint of a 'catch-up' clause that would provide that the first adjustment occurring during *permanent* total disability shall be larger than subsequent years' adjustments in order to make up for adjustments not made during the years of *temporary* total disability.

Thus . . . 'the intervening percentage increases' method of calculation adopted by *Holliday* finds no warrant in the statutory text." *Phillips*, at 1035.

The Fifth Circuit went on to state in *Phillips*, "Where the statute is so lucid, we need not look to the legislative history for further guidance." *Phillips*, at 1032. However, in a footnote, the Fifth Circuit quotes House and Senate Reports indicating that section 10(f) is intended " 'to provi[de] for upgrading benefits in *future* years for cases of *permanent* total disability or death benefits.' " *Phillips*, at 1032 *citing* H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972). S.Rep. No. 92-1125, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S.Code Cong. & Admin.News 4700.

The Court of Appeals for the Second Circuit adopted the rule of law as set forth in *Phillips* and rejected the position taken in *Holliday* on the grounds that *Holliday* conflicts with both the Board's and OWCP's interpretations of section 10(f). *Lozada v. Director, OWCP, U.S. Department of Labor et al.*, 903 F.2d 168 (1990).

Similarly, the Court of Appeals for the Ninth Circuit looked to the plain language of section 10(f) in its rejection of *Holliday* stating, "There is nothing in § 10(f) to suggest that Congress intended claimants who are permanently totally disabled to receive the benefit of intervening cost-of-living adjustments occurring during a prior period of temporary disability. . . . Had Congress intended § 10(f) to be interpreted as [Claimant] proposes, it could have included a 'catch-up' clause as it did in § 10(h) of the LHWCA, 33 U.S.C. § 910(h), which was passed at the same time as § 10(f). Section 10(h) provides

an explicit mechanism for increasing the level of compensation for claimants whose injuries result in total permanent disability or death prior to October 27, 1972 so that the award approximates the level of compensation awarded employees injured after that date. Thus, Congress knew how to draft a provision to account for inflation during periods of stable compensation, but did not include such a provision in § 10(f)." *Bowen v. Director, Office of Workers Compensation Programs et al.*, 912 F.2d 348, (9th Cir. 1990).

In the case at bar, Claimant was injured on August 14, 1984 and on January 19, 1994 was adjudged permanently and totally disabled by Administrative Law Judge Aaron Silverman. On August 17, 1994, upon a Motion for Reconsideration, Judge G. Marvin Bober, relying upon *Holliday* and rejecting *Lozada*, held that annual adjustments under § 10(f) of the Act, 33 U.S.C.A. § 910(f), accrue from the date of injury and not the date the claimant is found to be permanently, totally disabled. This decision has been affirmed by the Benefits Review Board and the Eleventh Circuit Court of Appeals.

However, Carrier submits that *Phillips*, *Bowen*, and *Lozada* were correctly decided and should be followed. As the Fifth, Second and Ninth Circuits have illustrated, the language in § 10(f) is plain and unambiguous and it is undisputed that § 10(f) as written applies only to periods of permanent total disability. Thus, the Eleventh Circuit's affirmation of *Holliday* has subverted the plain meaning of § 10(f) and placed the Eleventh Circuit at odds with her sister circuits.

A famous Georgia jurist, Justice Logan E. Bleckley, stated that a "precedent which has no characteristic but that of being a physical fact, is of very little consequence." *Kaufman v. Ferst & Co.*, 55 Ga. 350, 353 (1875). Since the *Holliday* decision has been overruled by the very court that issued it, it has no characteristic but that of being a physical fact and should not be upheld.

CONCLUSION

For the foregoing reasons, Employer respectfully requests that its Petition for Writ of Certiorari be granted and that the decision of the Eleventh Circuit be reversed.

Respectfully submitted,

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APPENDIX A

**SOUTHEASTERN MARITIME COMPANY,
Georgia Insurers Insolvency Pool, Petitioners,**

v.

Alonzo BROWN and Director, Office of Workers' Compensation, United States Department of Labor, Respondents.

**No. 96-9287
Non-Argument Calendar.**

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1997.

Petition for Review of an Order of the Department of Labor Benefits Review Board.

Before TJOFLAT, COX and BIRCH, Circuit Judges.

PER CURIAM:

Southern Maritime Company and Georgia Insurers Insolvency Pool (collectively "petitioners") appeal the decision of the Benefits Review Board pursuant to 33 U.S.C. § 921(c). That decision affirmed the Administrative Law Judge's determination that Alonzo Brown, who had been injured in a work-related accident, was entitled to permanent total disability, with annual adjustments to accrue from the date of temporary total disability.

Petitioners acknowledge that this case is controlled by precedent set forth by our predecessor circuit in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981), which held that, under section 10 of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C.

§ 910(f), a claimant's permanent total disability adjustment rate would include all intervening adjustments that occur during the period of his temporary total disability. Petitioners, however, point to the fact that the current Fifth Circuit has overruled *Holliday, see Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir.1990), and that this position also has been adopted by both the Second and Ninth Circuits. *See Lozada v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 903 F.2d 168 (1990) and *Bowen v. Director, Office of Workers Compensation Programs*, 912 F.2d 348 (9th Cir. 1990). Petitioners urge us to abandon *Holliday* in favor of the approaches taken by these other courts and hold that section 10(f) adjustments apply only to the period of a claimant's permanent total disability.

Our holding in *Holliday*, however, has been reaffirmed by the Eleventh Circuit subsequent to the circuit split. *See Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Hamilton*, 890 F.2d 1143 (11th Cir.1989) ("[W]e must affirm the decision of the Benefits Review Board unless this court, sitting en banc, overrules *Holliday*.") Notwithstanding petitioners' arguments regarding the wisdom of *Holliday* or the singularity of its holding relative to the other circuits, it is still binding precedent in our circuit. As noted in *Hamilton*, barring *en banc* reconsideration of *Holliday*, the reasoning and holding announced in that case remains the law. Accordingly, the decision of the Benefits Review Board is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-9287

SOUTHEASTERN MARITIME COMPANY,
GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

versus

ALONZO BROWN and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Appeal from the United States District Court for the Southern District of Georgia

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(Filed Nov. 26, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: TJOFLAT, COX and BIRCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

APPENDIX C

[SEAL]

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of: ALONZO BROWN, Claimant, v. SOUTHEASTERN MARITIME CO., Employer, and GEORGIA INSURERS INSOLVENCY POOL Statutory Obligor,	DATE: JAN 19 1994 CASE NO: 84-LHC-3178 OWCP NO: 6-77155

Paul H. Felser, Esq.
For the Claimant

Edward T. Brennan, Esq.
Richard C.E. Jennings, Esq.
For the Employer

Before: AARON SILVERMAN
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

Proceeding under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (Act).

ISSUE

Nature and Extent of Disability

Statement of the Case

The Claimant seeks compensation for permanent total disability beginning January 27, 1987. Although the Employer has paid compensation for temporary total disability, it contends that the Claimant is malingering and not disabled.

The Claimant was injured August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye and experienced pain in his neck and lower back. Subsequently he developed a psychological disorder diagnosed by Dr. Henry Brandt, his attending psychiatrist, as a post-traumatic reaction with severe somatication and conversion reaction process.

By decision and order of August 18, 1986, the Claimant was awarded benefits for temporary total disability because of his psychiatric and psychological problems.

FINDINGS AND CONCLUSIONS

Permanent disability, as interpreted in case law, is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration. A Claimant is permanently disabled if disability exists after

maximum medical improvement is reached. Permanent does not mean unchanging.

The Claimant is still under Dr. Brandt's care. The Employer bases its defense of malingering on the conclusion reached by Dr. Erwin R. Smarr, a psychiatrist, who is the medical director of the Department of Psychiatry of the Memorial Medical Center and so testified at a third-party jury trial in October 1988.

A second hearing was conducted in this matter March 10, 1993. In connection with it, Dr. Brandt was deposed March 4, and Dr. Smarr was deposed March 8. Dr. Smarr had changed his opinion. In unequivocal terms, each doctor has now concluded that the Claimant cannot return to his longhsore [sic] or other employment, and is permanently and totally disabled by his psychiatric and psychological problems arising from his work-related accident on August 14, 1983. Except for Dr. Smarr's earlier opinion, there is no evidence to the contrary.

Dr. Brandt provided a physician's statement for a pension committee dated January 29, 1987, in which he concluded that the Claimant was totally and permanently disabled. In the absence of other definitive information, that date is accepted as the date of maximum medical improvement from which permanency ensues.

ORDER

The Employer shall:

1. Pay to the Claimant compensation for all temporary total disability and beginning January 29, 1987 for permanent total disability at the rate and in a manner

consistent with applicable statutory and regulatory provisions beginning.

2. Pay and reimburse the Claimant for all medical costs incurred as a result of his employment-related injuries.

3. Pay all interest and penalties, if any, that may be required by applicable statutory and regulatory provisions.

/s/ Aaron Silverman
AARON SILVERMAN
Administrative Law Judge

CERTIFICATE OF FILING AND SERVICE

I certify that on February 4, 1994 the foregoing Compensation Order was filed in the Office of the District Director, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Alonzo Brown, 1830 Champion St., Savannah, GA 31405
Claimant

Attorney Paul H. Felser, P. O. Box 9087, Savannah, GA 31412
Claimant's Attorney

Georgia Insurers Insolvency Pool, 2799 Lawrenceville Hwy., Suite 200, Decatur, GA 30033

Insurance Carrier/Employer (if self insured)
**(if applicable)

Attorney Edward Brennan, P. O. Box 2784, Savannah, GA 31402
Insurance Carrier's Attorney

A copy was also mailed by regular mail to the following:

Judge Aaron Silverman, Office of Administrative Law Judges, U. S. Department of Labor, 800 K Street, N. W., Washington, DC 20001-8002

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, 200 Constitution Ave., N. W., Suite S-4325, NDOL, Washington, DC 20210

/s/ N. Sandra Ramsey
N. SANDRA RAMSEY
District Director
Sixth Compensation District
U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
214 North Bogan Street, Suite 1040
Jacksonville, Florida 32209

**_POSTSCRIPT TO SELF-INSURED EMPLOYER/INSURANCE CARRIER:_ Please submit Form LS-208 to indicate payment in accordance with the attached Compensation Order within 16 days of the payment. Failure to do so shall result in a $100.00 penalty per Section 14(g) of the Longshore Act.

APPENDIX D

[SEAL]

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:	CASE NO.: 84-LHC-3178
ALONZO BROWN, Claimant,	OWCP NO.: 6-77155
v.	
SOUTHEASTERN MARITIME COMPANY, Employer,	
and	
GEORGIA INSURERS INSOLVENCY POOL, Carrier.	

Appearances:

Edward T. Brennan, Esq.
For the Carrier

Paul H. Felser, Esq.
For the Claimant

Before: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

This proceeding arises from a claim filed under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* A hearing in the matter was held on before Judge Aaron Silverman[1] on March 10, 1993.

On January 19, 1994, Judge Silverman issued a Decision and Order wherein he found the Claimant to be entitled to permanent total disability from January 29, 1987.

On February 14, 1994, Carrier timely filed a Motion for Reconsideration, asserting that the Decision should be clarified to provide that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury. Judge Silverman's decision was silent with regard to annual adjustments.

Claimant responded to Carrier's Motion on May 31, 1994. Claimant argues that Carrier's Motion asks this court to overrule or disregard binding precedent with respect to this claim. Claimant requests the assessment of a reasonable attorney fee for responding to Carrier's Motion.

---

[1] As Judge Silverman is now retired, I am handling the Motion for Reconsideration in this case, pursuant to my order dated April 19, 1994.

DISCUSSION AND CONCLUSIONS

Section 10(f) of the Act provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of –
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable average weekly wage, as so determined, for the period beginning with the preceding October 1; or
>
> (2) 5 percentum.

33 U.S.C. § 10(f).

In *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit held that Section 10(f) cost of living adjustments accrue from the date of injury, rather than from the date of permanent, total disability. An en banc Fifth Circuit overruled *Holliday*, however, in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990). The court found from the plain and unambiguous words of Section 10(f) that the only cost of living adjustments Section 10(f) provided were for permanent total disability. There are no cost of living adjustments for periods of temporary total disability, or for the Section 10(f) adjustments that accrued during the worker's period of temporary total disability.

This claim falls within the jurisdiction of the Eleventh Circuit. Decisions of the Fifth Circuit, as that court existed on September 30, 1981 and handed down by that court prior to the close of business on that date, are precedent in the Eleventh Circuit unless specifically overruled. Thus, *Holliday* is binding precedent in the Eleventh Circuit, but *Phillips* is not.

In *Hamilton v. Crowder Construction Co.*, 22 BRBS 121 (1989), a case arising within the Eleventh Circuit, the Benefits Review Board held that since *Holliday* was issued prior to September 30, 1981, it was compelled to apply its holding to the payments of permanent total disability benefits. The Eleventh Circuit affirmed this decision in a per curiam opinion, stating that "we must affirm the decision of the Benefits Review Board unless this court, sitting en banc, overrules *Holliday*." *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (emphasis added).

The Board, however, took it upon itself to overrule *Holliday* in the Eleventh Circuit, as well as the Fifth Circuit, in *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990). In a cursory discussion, the Board stated that although the Eleventh Circuit has not itself addressed the issue of whether Section 10(f) adjustments are applicable to periods of temporary total disability, "since *Holliday* has been overruled by the Fifth Circuit, we believe it would be incongruous to follow it in this case." *Id.* at 232. The Board overstepped its authority in *Stanfield* case: the Eleventh Circuit clearly stated in *Hamilton* that *Holliday* would have to be overruled by an en banc Eleventh Circuit. I therefore find that *Holliday* is still binding precedent in the Eleventh Circuit and that all Section 10(f) cost

of living adjustments in this case accrue from the date of injury.

Attorney Fees

Since Claimant has successfully defended against Carrier's Motion for Reconsideration, Claimant's attorney is entitled to a reasonable and necessary fee to be substantiated by an itemized fee petition. 33 U.S.C. § 928. Such a fee petition must meet the requirements set forth in 20 C.F.R. § 702.132 and must be submitted within 30 days of the date of issuance of this Order. Employer/ Carrier shall then have 30 days following the submission of this fee petition to respond.

ORDER

In light of the above, it is ORDERED that:

1. Carrier's Motion for Reconsideration is DENIED;

2. Carrier shall pay Claimant Section 10(f) cost of living adjustments from the date of injury; and

3. Paul H. Felser, Esq., submit an application for attorney fees pursuant to 20 C.F.R. § 702.132 within thirty (30) days of the issuance of this order. After receipt of such application, Employer will be allowed thirty (30) days in which to submit a reply.

/s/ G. Marvin Bober
G. MARVIN BOBER
Administrative Law Judge

GMB/kad

Dated: AUG. 17, 1994
Washington, D.C.

APPENDIX E

[SEAL]

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

Re: Alonzo Brown v. Southeastern Maritime Company, Georgia Insurers Insolvency Pool (Case No. 84-LHCA-3178) (OWCP No. 06-0077155) (BRB No. 94-4002)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached

please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1995

Sincerely

/s/ Thomas O. Shepherd, Jr./P.F.
Thomas O. Shepherd, Jr.
Clerk of the Board

Supreme Court, U.S.
FILED
MAR 25 1998
CLERK

No. 97-1394

In The

Supreme Court of the United States

October Term, 1997

SOUTHEASTERN MARITIME COMPANY AND
GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

v.

ALONZO BROWN and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether annual adjustments under § 10(f) of the Longshore and Harbor Worker's Compensation Act accrue from the date of injury, and not from the date the claimant is found to be permanently, totally disabled.

Whether this Court's decision can be applied retroactively to affect this case.

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties to the proceeding.

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CITATIONS TO OPINIONS AND ORDERS BELOW

Respondent has no additions to this section.

STATEMENT OF BASIS FOR JURISDICTION

Respondent has no additions to this section.

STATUTES INVOLVED IN THE CASE

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under § 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum. 33 U.S.C. § 910(f).

STATEMENT OF FACTS

1. Respondent was injured on August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye; experienced pain in his neck

and lower back; and subsequently experienced residual psychological problems.

2. He has never been able to return to work since his injury.

3. He has been awarded compensation benefits for total disability from the date of injury to present.

4. On or about January 19, 1994, the Honorable Aaron Silverman issued a Decision and Order wherein he found Respondent to be entitled to permanent total disability from January 29, 1987 and continuing.

5. On or about February 14, 1994, Petitioner timely filed a Motion for Reconsideration asserting that the Decision should be clarified to provide that annual adjustments under § 10(f) accrue from the date the Respondent is found to be permanently, totally disabled, and not from the date of the injury.

6. On or about August 17, 1994, the Honorable G. Marvin Bober issued a Decision and Order on Motion for Reconsideration in which he acknowledged that *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981) is still binding precedent in the Eleventh Circuit.

7. On or about September 13, 1994, Petitioner appealed the decision of Administrative Law Judge Bober to the Benefits Review Board.

8. On or about September 12, 1996, the Benefits Review Board affirmed the decision of Administrative Law Judge Bober.

9. On or about October 28, 1996, Employer timely filed a Petition with the Eleventh Circuit for Review of the order of the Benefits Review Board.

10. On or about September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer's Petition.

11. On or about November 26, 1997, Employer timely filed a Suggestion for Rehearing *En Banc*.

12. On or about November 26, 1997, the Court of Appeals denied Employer's Suggestion for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

I. The issue in this case is whether § 10(f) of the Longshore and Harbor Worker's Compensation Act entitles a permanently totally disabled Claimant to receive annual compensation adjustments accruing each October 1st beginning from the date of injury.

The Petitioner has sought review by this Court to determine the accrual date for cost of living increases (hereinafter COLA) for longshoremen who have become permanently totally disabled due to a job-related injury. Certiorari should not be granted to the Petitioner on the question presented. This case involves a very narrow issue, affecting only a handful of individuals nationwide. Moreover, the Eleventh Circuit's opinion retains the best, most common sense application of the COLA for individuals who have suffered permanent total disability. The Eleventh Circuit continues to follow the rule of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), because

it fairly and uniformly applies the COLA to longshoremen based on the ultimate status of their injury, not the mere fortuity of their adjudication date. *Hamilton v. Crowder Construction Co.*, 22 B.R.B.S. 121, (1989), *aff'd*, 890 F.2d 1143 (11th Cir. 1989). The language of the statute is *not* offended by this interpretation. On the contrary, the spirit and intent of Congress in providing those claimants who are permanently totally disabled with a meaningful and uniformly applied COLA is maintained.

II. The position urged by the Petitioner would create arbitrary and inconsistent results.

As urged by the Petitioner, § 10(f) of the Longshore Act would apply as follows:

1. Two Claimants have the same date of injury.

2. Neither Claimant has ever been released to return to work by his doctor.

3. Both men have the same compensation rate based on identical earnings.

4. Both men have been determined by their doctors to be permanently totally disabled.

5. Claimant A, however, was adjudicated permanently totally disabled three years from his date of injury. Claimant B was not adjudicated permanently totally disabled until six years from his date of injury.

6. Even though both Claimants were identically situated from the first day of their injuries; even though both men now have the same disability status; Claimant A will receive a substantially higher benefit than Claimant B.

There is no rational basis upon which to treat the two individuals differently. The date of their injury was the date when their compensation rates were frozen. Both individuals have achieved the requisite status entitling them to the increase. Common sense suggests that they should be treated consistently. *The position urged by Petitioners would encourage frivolous delays in the adjudication process in order to defer the COLA.*

Contrary to Petitioner's argument, Congress did not expressly prohibit the COLA from being calculated beginning October 1st following the date of injury. If anything, § 10(f) is silent with respect to the year in which the benefit begins to accrue. It simply states that there shall be a cost of living adjustment calculated October 1st of "each year". The statute then states that the adjustment shall be added to benefits being paid for permanent total disability. If Congress had intended this benefit to operate as Petitioner urges, the language could have been made express. As shown above, Petitioner's argument created arbitrary and inconsistent results. Under *Holliday* and *Hamilton*, the results are consistent and predictable. A COLA provision that does not adjust benefits uniformly so that similarly situated claimants are treated consistently would not fulfill the intent of Congress. Petitioner's interpretation does not promote uniformity or fairness, which Congress must be deemed to have intended. The Eleventh Circuit's position is therefore entirely plausible and consistent with the statute.

III. *Holliday* and *Hamilton* represent a common sense application of § 10(f).

Section 10(f) of the Longshore and Harbor Workers' Compensation Act provides:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under § 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,
>
> (2) 5 per centum 33 U.S.C. § 910(f).

In *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), prior to the split between the Fifth Circuit and the Eleventh Circuit, the Fifth Circuit held that claimant's permanent total disability adjustment rate would include all intervening § 10(f) adjustments occurring during the period of his temporary total disability.

After the split between the Fifth and Eleventh Circuits, a three judge panel of the Eleventh Circuit refused to overrule *Holliday. Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Hamilton*, 890 F.2d 1143 (1989). En Banc review was rejected by the Eleventh Circuit on March 15, 1990. The order signed by Chief Justice Tjoflat stated "The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested

that the Court be polled on rehearing En Banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED." See Appendix A.

The Respondent is certainly aware of contrary decisions in other jurisdictions. Nevertheless, Respondent contends that the Eleventh Circuit has correctly continued to follow the statute and Congressional intent with respect to the less-than-artful language set forth in § 10(f).

Prior to 1972, there was no provision in the LHWCA providing for annual adjustments. When Congress added § 10(f) in 1972, the clear intent was to provide Claimants suffering from a permanent total disability with a genuine cost of living increase. The House and Senate Reports succinctly state that § 10(f) is intended to "provi[de] for upgrading benefits in future years for cases of permanent total disability or death benefits". H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972); S.Rep. No. 92-1125, 92d Cong., 2d Sess. 6 (1972), reprinted in 1972 (emphasis added).

In this case, Respondent suffered a period of "temporary" total disability which eventually became "permanent". Following his injury, he was never able to return to work. Respondent has been totally disabled from all work from the date of his injury to present. Statutory construction compels us to lend a common sense interpretation to what would otherwise be an artificial distinction between Respondent's total disability and a formal adjudication of this fact.

Judge Tang addressed this artificial distinction in his special concurrence in *Bowen v. Director, OWCP, et al.*, 912

F.2d 348 (9th Cir. 1990). In *Bowen*, Judge Tang writes as follows:

> This result defies common sense. Indeed, the D.C. Circuit noted that a more "sensible" reading of the Act would permit inclusion of periods of "temporary" disability preceding classification as "permanent" in cost-of-living increase computations. *Brandt v. Stidham Tire Co.*, 251 U.S. App. D.C. 331, 785 F.2d 329, 332 n. 4 (D.C. Cir. 1986). In the D.C. Circuit's case, a worker was classified as "temporary" disabled for eight years while "it was unclear whether his total disability would endure" before, upon adjudication and classification as "permanently" disabled, he became eligible for cost-of-living increases. *Id.* at 331. Of course, the worker was as "permanently" disabled at the beginning of his "temporary" eight years' disability as he was at the end of it. *Common sense and fairness would dictate treating both periods alike. Their disparate treatment not only offends common sense and fairness, but also may discourage workers from attempting to return to work because any postponement of "permanent" disability will, as in Bowen's case, disqualify the interim period from computation in cost-of-living increases. Id.*, at 352. (Emphasis added).

These points are directly in keeping with Respondent's circumstances in this action. He has never been able to return to work, he has been totally disabled from all work from the date of his injury to present.

Finally, Judge Tang adds, " . . . a line drawn at the adjudication of a 'permanent' disability which excludes a

period immediately preceding it of 'temporary' total disability *makes no practical sense and fails to serve the beneficent purposes of the Act." Id.*, at 352. (Emphasis added).

IV. Certiorari should not be granted, because this Court's decision would not apply retroactively.

In *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 B.R.B.S. 36 (CRT) (5th Cir. 1990), the Court addressed this issue as follows:

> The well-known test that must be met before a new decision can be applied non-retroactively is set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971): First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. . . . Finally, we have weighed the inequity imposed by retroactive application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Id.*, at 1036.

In this case, Respondent meets the test for non-retroactive application. If *Holliday* is reversed, the Court will

be announcing a new rule in the Eleventh Circuit. Secondly, the Longshore Act has always received liberal construction. The interpretation proposed is consistent with the beneficent purposes of the Act. Here, retroactive application may result in a disgorgement of past benefits that would work undue hardship in this instance. Contrary to *Phillips*, neither the Director, nor the Employee/Insurer, have promised *not* to seek disgorgement of past benefits. Even were such promise made, Respondent submits that he would be subjected to "substantial inequity" contrary to the intent of the Act.

CONCLUSION

The Petitioner has asked this Court to overrule binding precedent in the Eleventh Circuit. Respondent is opposed. In this instance, the lower court has had the opportunity to address this issue twice, once in *Hamilton* and again with this case. Their ruling remains sound and should not be disturbed.

Once again, this issue involves a very narrow question affecting only a handful of individuals nationwide. The Eleventh Circuit's opinion retains the best, most common sense application of the COLA for individuals who have suffered permanent total disability.

Based on the foregoing, Respondent requests that the Petition for Certiorari be denied.

This 25th day of March, 1998.

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8391

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

ROBERT L. HAMILTON, CROWDER CONSTRUCTION and AETNA CASUALTY AND SURETY COMPANY,

Respondent.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion December 18, 1989, 11 Cir., 198___, ___F.2d___).

(Filed Mar. 15, 1990)

Before TJOFLAT, Chief Judge, and KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edward Tjoflat
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 27 1998
CLERK

No. 97-1394

In the Supreme Court of the United States

OCTOBER TERM, 1997

SOUTHEASTERN MARITIME COMPANY, ET AL.,
PETITIONERS

v.

ALONZO BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 10(f) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 910(f), provides for annual cost-of-living adjustments for benefit recipients who are permanently totally disabled. No provision is made for recipients who are temporarily totally disabled. The question presented is:

Whether the initial compensation payable upon a determination of permanent total disability, on which future cost-of-living adjustments will be based, should be calculated as though the claimant had received similar adjustments during a preceding period of temporary total disability.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1394

SOUTHEASTERN MARITIME COMPANY, ET AL.,
PETITIONERS

v.

ALONZO BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 121 F.3d 648. The notice of statutory affirmance issued by the Benefits Review Board (Pet. App. 16-17) and the decisions of the administrative law judge (Pet. App. 5-15) are unreported.[1]

[1] The appendix to the petition does not contain the first administrative decision in this case (dated August 18, 1986), which found respondent to be temporarily totally disabled. See Pet. App. 6. We have lodged a copy of that decision with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1997. A petition for rehearing was denied on November 26, 1997. Pet. App. 3-4. The petition for a writ of certiorari was filed on February 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires a covered employer to pay compensation for an employee's disability or death resulting from an injury sustained on or near navigable waters of the United States. 33 U.S.C. 903(a), 904(a). Section 8 of the Act provides for compensation for four different types of disability: permanent total, temporary total, permanent partial, and temporary partial. 33 U.S.C. 908(a)-(c) and (e). Because a total disability is not considered "permanent" until the claimant has reached the point of "maximum medical improvement," see, *e.g.*, *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 124-126 (5th Cir. 1994) (White, J., sitting by designation), most claimants who are eventually classified as permanently totally disabled are first classified as temporarily totally disabled for some period after the date of their injury.

A covered employee who is either temporarily or permanently totally disabled generally receives an LHWCA benefit equal to 66 2/3% of his average weekly wages, calculated as of the time of the disability and subject to certain maximum and minimum limitations. 33 U.S.C. 906(b), 908(a)-(b), 910. Under Section 10(f) of the Act, however, the compensation payable with respect to permanent total disability is subject to limited yearly cost-of-living adjustments:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of—
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
>
> (2) 5 per centum.

33 U.S.C. 910(f). There is no comparable statutory provision for adjustments to the compensation paid with respect to any other type of disability, including temporary total disability.

2. On August 14, 1983, respondent Brown sustained a head injury while working for petitioner Southeastern Maritime Company. Pet. App. 6. He subsequently developed a disabling psychological disorder diagnosed as a post-traumatic reaction. *Ibid.* On August 18, 1986, an administrative law judge (ALJ) awarded respondent compensation for temporary total disability because of his psychiatric and psychological problems. *Ibid.*[2] That award was

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[2] LHWCA claims are initially adjudicated by the Department of Labor's Office of Workers' Compensation Programs (OWCP). See 33 U.S.C. 919(a) and (c); 20 C.F.R. 702.311-702.315. If OWCP is unable to resolve a claim informally, the claimant or employer may obtain a hearing before an ALJ. 33 U.S.C. 919(c) and (d); 20 C.F.R. 702.316-702.317, 702.331. ALJ decisions are reviewable by the Department's Benefits Re-

retroactive to the date of injury and was effective until further notice. 8/18/96 ALJ Dec., slip op. 9 (see note 1, *supra*).

Respondent Brown later sought compensation for permanent total disability beginning January 29, 1987, because a psychiatrist had concluded on that date that he was permanently and totally disabled. Pet. App. 6-7. Petitioners (the employer and its insurance carrier) responded by seeking to terminate payment of any compensation, on the ground that another psychiatrist had testified, in a related lawsuit, that respondent was malingering. *Ibid.* In January 1994, an ALJ found that the second psychiatrist had since changed his opinion and had concluded that respondent was indeed permanently and totally disabled by psychiatric problems arising out of his accident. *Id.* at 7. The ALJ awarded compensation for permanent and total disability beginning January 29, 1987. *Ibid.*

3. Petitioners did not further dispute the award of permanent total disability benefits, but they sought a modification of the award to provide that cost-of-living adjustments under Section 10(f) of the Act would begin from the date as of which respondent was found to have become permanently disabled (January 29, 1987), not from the date of injury. Pet. App. 11. In August 1994, an ALJ denied that request. *Id.* at 10-15. He concluded that this case was controlled by *Holliday*

---

view Board, and the Board's decisions are subject to review in the courts of appeals. 33 U.S.C. 921(a)-(c); 20 C.F.R. 702.391, 802.410(a). The Director of OWCP may appear as a party in the administrative proceedings, see 20 C.F.R. 702.333(b), 801.2(a)(10), and must be named as a respondent in any proceeding for review in the court of appeals. See Fed. R. App. P. 15(a); *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 805-808 (1997).

v. *Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981), which held that although no cost-of-living adjustment is to be made during any period of temporary total disability, the first payment for the period after the disability becomes total (which then serves as the basis for future adjustments) should be computed *as if* the claimant had received adjustments during the temporary disability period. See *id.* at 417, 422. Although the ALJ recognized that *Holliday* had been overruled by the Fifth Circuit after its separation from the Eleventh, he concluded that the case was still controlling in the Eleventh Circuit. Pet. App. 12-13 (discussing *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc) (overruling *Holliday*), and *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (following *Holliday*)). He therefore ordered petitioners to compute respondent's disability compensation by including cost-of-living adjustments retroactive to the date of injury (August 14, 1983). Pet. App. 14.

In September 1994, petitioners appealed the ALJ's decision with respect to cost-of-living adjustments to the Benefits Review Board. C.A. App. R28. In 1996, Congress directed that all appeals that had been pending before the Board for more than one year were to be deemed affirmed if the Board did not act by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, 110 Stat. 1321-211. The Board did not act on petitioners' appeal before the deadline, and the ALJ's decision therefore became final as of that date. Pet. App. 16-17.

4. The court of appeals affirmed. Pet. App. 1-2.[3] In a brief per curiam opinion, the court acknowledged that the decision in *Holliday* had been overruled by the Fifth Circuit and rejected by the Second and Ninth Circuits. *Id.* at 2. It noted, however, that *Holliday*'s holding had been reaffirmed by the Eleventh Circuit after that court separated from the Fifth Circuit. *Ibid.* (citing *Hamilton*, *supra*). The court therefore concluded that, "[n]otwithstanding petitioners' arguments regarding the wisdom of *Holliday* or the singularity of its holding relative to the other circuits, it is still binding precedent in our circuit" in the absence of en banc reconsideration. *Ibid.* Although petitioners thereafter sought rehearing en banc, the full court rejected that suggestion without comment or a poll of the court. Pet. App. 3-4.

DISCUSSION

1. The Eleventh Circuit's decision in this case and its refusal to consider the matter en banc confirm that court's continued adherence to a position that is inconsistent with the text of the LHWCA. Section 10(f) of the Act provides for limited cost-of-living adjustments to "the compensation or death benefits payable [under the Act] for *permanent* total disability or death." 33 U.S.C. 910(f) (emphasis added). As we have explained (see page 2, *supra*), LHWCA claimants become "permanently" totally disabled only once it is shown that they remain totally disabled after reaching the point of maximum medical improvement. The Director of the OWCP and the courts of appeals for the Second, Fifth and Ninth Circuits have read

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[3] The Director did not participate in the proceedings before the court of appeals.

the plain language of the Act to authorize cost-of-living adjustments only after the disability has become "permanent" for statutory purposes. See *Bowen* v. *Director, OWCP*, 912 F.2d 348 (9th Cir. 1990); *Lozada* v. *Director, OWCP*, 903 F.2d 168 (2d Cir. 1990); *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc). As the Fifth Circuit observed, Section 10(f) contains "no hint of a 'catch-up' clause that would provide that the first adjustment occurring during *permanent* total disability shall be larger than subsequent years' adjustments in order to make up for adjustments not made during the [preceding period] of *temporary* total disability." *Phillips*, 895 F.2d at 1035; see also *Bowen*, 912 F.2d at 351.[4]

This Court has repeatedly instructed that, in interpreting the LHWCA as in other contexts, plain statutory language controls unless it leads to results that are "absurd or glaringly unjust." *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 804 (1997); see also, *e.g.*, *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295 (1995); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475-477 (1992). In this instance, adherence to the statutory text merely implements limitations that Congress deliberately imposed on the disability benefits mandated by the LHWCA. Cf. *Potomac Elec. Power Co.* v. *Director*,

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[4] As the Ninth Circuit pointed out in *Bowen*, 912 F.2d at 351, "Had Congress intended § 10(f) to be interpreted as [the Eleventh Circuit interprets it], it could have included a 'catch-up' clause as it did in § 10(h) of the LHWCA, 33 U.S.C. § 910(h), which was passed at the same time as § 10(f). * * * Congress knew how to draft a provision to account for inflation during periods of stable compensation, but did not include such a provision in § 10(f)."

OWCP, 449 U.S. 268, 282 & n.24 (1980) ("[L]ike most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers."). Cost-of-living adjustments help prevent the value of a compensation award from being eroded over time by the effects of general economic inflation. See 5 A. Larson & L. Larson, *Larson's Workers' Compensation Law* (*Larson's*) § 60.61 (1997); 118 Cong. Rec. 36,386 (1972) (statement of Rep. Steiger). Because the rate of inflation over time is difficult to predict, however, inflation adjustments introduce significant uncertainty into the actuarial computations necessary to set premiums for the insurance that private employers typically purchase to cover the cost of LHWCA claims. That, in turn, increases the cost and decreases the availability of such insurance. See S. Rep. No. 81, 98th Cong., 1st Sess. 21, 33 (1983); 129 Cong. Rec. 16,254 (1983) (statement of Sen. Hatch). By enacting Section 10(f) but limiting its coverage to benefits payable for permanent total disability or death, Congress provided significant inflation protection once it becomes clear that an individual is likely to rely on LHWCA disability benefits over the long term, while limiting the cost and insurability consequences to covered employers. Compare *Larson's* § 60.62 ("Most [state] adjustment clauses cover only wage-loss benefits for total disability—often only permanent total—and death.") (footnotes omitted).[5]

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[5] Before it enacted Section 10(f) in 1972 (Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 11, 86 Stat. 1258), Congress had rejected proposals that would have required inflation adjustments

2. As we have noted, the decision below conflicts directly with decisions of the Second, Fifth and Ninth Circuits. See pages 6-7, *supra*. It adheres instead to the decision of the former Fifth Circuit in *Holliday* v. *Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981). Pet. App. 2; see *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (decisions of the Fifth Circuit issued on or before September 30, 1981 adopted as binding precedent in the Eleventh Circuit).

Holliday was an unusual case. Like this case, it involved an injured worker who was found to be permanently totally disabled following a period of temporary total disability. At oral argument in *Holliday*, the court asked the attorneys representing the claimant and the Director to submit a joint proposal for computing the claimant's disability under Section 10(f).[6] See 654 F.2d at 417. The attorneys drafted such a proposal and submitted it to the court, which appended it to the opinion in the case. *Id.* at 417, 421-423. In the joint statement, counsel for the Director explained that the claimant's argument that he was entitled to receive retroactive adjustments covering prior periods of temporary disability was incorrect

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for any type of disability award. See S. 2318, 92d Cong., 1st Sess. § 11 (1971); H.R. 12006, 92d Cong., 1st Sess. § 11 (1971); 117 Cong. Rec. 44,321 (1971) (statement of Rep. Daniels); *Bowen*, 912 F.2d at 351 n.4. In 1984, Congress added the present 5% cap on the amount of annual inflation adjustments under Section 10(f). Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 10(b), 98 Stat. 1648 (enacting 33 U.S.C. 910(f)(2)).

[6] The employer and insurance carrier did not participate in the appeal—or, consequently, in the proposal. 654 F.2d at 417.

because adjustments under Section 10(f) "apply only to permanent total disability and death benefits." 654 F.2d at 422. She further represented, however, based on her understanding of the Director's position, that making no adjustment to the claimant's initial rate of compensation for permanent total disability would be "contrary to and frustrate[] the purpose of § 910(f)." *Ibid.* Counsel accordingly proposed a third option, to which the claimant's lawyer agreed: "When the compensation rate changes from temporary total to permanent total disability as of [a specified date], the compensation rate for permanent total disability should include the *intervening percentage increases* under § 910(f)." *Ibid.* The court in *Holliday* adopted that proposal. *Id.* at 417.[7]

The position advanced after argument by the Director's counsel in *Holliday*, and adopted by the court in that case, was not in fact consistent with OWCP's practice at the time. See *Phillips* v. *Marine Concrete Structures*, 895 F.2d 1033, 1035 & n.4 (5th Cir. 1990) (en banc); U.S. Dep't of Labor, LHWCA Circular No. 83-3 (Feb. 23, 1983). OWCP reaffirmed its contrary position after reconsidering the matter in light of *Holliday*, but for a time the Director did not challenge contrary administrative rulings in cases in which appeal would lie to the Fifth Circuit. *Ibid.* In 1986, however, a panel of the D.C. Circuit criticized the Director for not having "present[ed] his disavowal to the circuit that adopted [the *Holliday* rule] on his counsel's urging," and announced that it

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[7] As the full Fifth Circuit commented later when it overruled *Holliday*, the panel's judgment in that case "was more in the nature of approval of a settlement than of a ruling on a contested matter of law." *Phillips*, 895 F.2d at 1035 n.4.

would "accept the *Holliday* ruling as the proper reading of the statute in this circuit at least until the precedent is overruled in the Fifth Circuit, or the Director publicly announces that, prospectively, he will seek to apply his current interpretation even-handedly to all similarly disabled claimants in all circuits." *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329, 332 (D.C. Cir. 1986) (per curiam). One month after the release of the opinion in *Brandt*, the Director announced that his longstanding interpretation of the statute would thenceforth be "applied uniformly in all district offices," including those in the Fifth Circuit. U.S. Dep't of Labor, LHWCA Circular No. 86-2 (Apr. 10, 1986).

When a case in which the Director's position on this issue was accurately represented subsequently arose in the Fifth Circuit, a panel of that court initially followed *Holliday*, but invited the filing of a petition for rehearing en banc. *Phillips* v. *Marine Concrete Structures, Inc.* (*Phillips I*), 877 F.2d 1231, 1237 (1989). On rehearing, the full court unanimously reversed, finding the Director's position to be consistent with the "plain and unambiguous" language of Section 10(f). *Phillips*, 895 F.2d at 1035 ("the 'intervening percentage increases' method of calculation adopted by *Holliday* finds no warrant in the statutory text"). Shortly after that decision was announced in March 1990, the Second and Ninth Circuits likewise concluded that the Director's position embodied the only plausible reading of the statute. *Lozada*, 903 F.2d at 170 (decided May 14, 1990); *Bowen*, 912 F.2d at 351 (decided August 24, 1990) ("In light of the statutory language and legislative history of § 10(f), we are compelled to conclude that the Director's construction of this section is correct"; although "the

result is a harsh one," the "statute is clear, * * * and if it is to be modified, Congress will have to do it"); see also *id.* at 351-352 (Tang, J., concurring) (result "legally compelled").

After the Fifth Circuit had granted rehearing en banc in *Phillips*, but before it had rendered its decision, the Eleventh Circuit decided *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (1989). In a one-paragraph per curiam opinion, the court acknowledged the Director's concession that the case was governed by *Holliday*, and entered judgment "without prejudice to the Director's right to petition the court for rehearing en banc." *Ibid.* The Director exercised that right, but the court denied his petition—once before the Fifth Circuit's en banc decision in *Phillips* could be brought to its attention, and then again after the Director moved for reconsideration in light of that decision.[8] The court in this case relied on *Hamilton*, repeated its observation that *Holliday* remained binding circuit precedent "barring *en banc* reconsideration" (Pet. App. 2), and then again denied the ensuing petition seeking such reconsideration (*id.* at 3-4). The Eleventh Circuit has thus declined to reconsider its position on this issue even in light of the uniformly contrary conclusion of other circuits (including the Fifth), either at the Director's suggestion or at the request of an aggrieved private employer.[9]

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[8] The second denial also came two weeks after the announcement of the Second Circuit's decision in *Lozada*. The government did not ask this Court to review the *Hamilton* decision.

[9] Because of the peculiar posture of the D.C. Circuit's *Brandt* case (see 785 F.2d at 330 ("In considering the petition for review, we are mindful that this circuit is not destined to

3. The Eleventh Circuit's perpetuation of the erroneous rule mistakenly adopted in the *Holliday* case interferes with the LHWCA's central goal of providing a uniform nationwide workers' compensation scheme for the maritime workers and employers covered by the Act. Implementation of non-uniform rules inevitably increases the Director's burdens and costs in administering the Act. Moreover (and more importantly), in cases in which review lies in the Eleventh Circuit, employees will continue to receive benefits, and employers will continue to bear costs, not authorized by Congress. Although annual cost-of-living adjustments in recent years have typically been small, in the aggregate and over time the Eleventh Circuit's *Holliday* adjustments will continue to impose statutorily unjustified incremental costs that may well appear significant to the employers that must bear them.[10]

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continue as a prominent appellate forum in LHWCA cases.") and its explicitly qualified holding (see *id.* at 332 (based on reluctance to "create a circuit split" by disagreeing with *Holliday*; acceptance of *Holliday* "at least until * * * overruled in the Fifth Circuit, or until the Director publicly announces" uniform adherence to the contrary view)), we believe this issue remains open in the D.C. Circuit. No other court of appeals (apart from those discussed in the text) has addressed the issue.

[10] In *Phillips*, where the claimant was temporarily totally disabled for about twenty-six months before becoming permanently totally disabled, the court calculated that a hypothetical five percent annual *Holliday* adjustment could lead to an increase of more than 15% in an employee's initial rate of permanent disability compensation. See *Phillips I*, 877 F.2d at 1233 n.2; see also *Holliday*, 654 F.2d at 422 (21%). Other reported cases have involved longer initial periods of temporary total disability. See *Lozada*, 903 F.2d at 169 (four years); Pet.

At the same time, the Eleventh Circuit's erroneous ruling on the narrow question of statutory construction presented by this case affects a relatively small absolute number of individuals and employers from a nationwide perspective, involves a relatively small amount of money in the context of the economy as a whole, and is not of broader legal significance. Thus, while we do not oppose resolution of the issue by this Court, we are unable to conclude, despite the real and persistent circuit conflict, that the issue warrants the Court's plenary consideration at the present time. We would not rule out the possibility that the Eleventh Circuit might be prepared to consider the issue en banc and overrule *Holliday* if the Director, who is responsible for administering the LHWCA program (and whose interpretation is entitled to judicial deference), filed or supported a new suggestion of hearing or rehearing en banc urging it to do so. The Director could, for example, bring to that court's attention statistics concerning the number of individuals in the Eleventh Circuit (now more than 180) who receive permanent total disability payments.[11]

App. 6-7 (41 months); *Bowen*, 912 F.2d at 349 (two periods totaling 35 months over 5 1/2 years); *Holliday*, 654 F.2d at 416 (32 months); cf. *Brandt*, 785 F.2d at 332 n.2 (eight years involved in that case "atypical"). The most recent Section 10(f) adjustment (October 1, 1997) was 4.33%. LHWCA Bulletin No. 98-1 (Oct. 1, 1997). Between October 1985 and October 1996, the adjustments ranged from 1.69% to 3.83%. U.S. Dep't of Labor, Employment Standards Admin., *OWCP Annual Report to Congress FY 1996*, at 54 (1997).

[11] OWCP informs us that there were 4390 individuals receiving permanent total disability benefits under the Act as of January 1, 1998. At least 186 of those cases fall within the

If the Court is not inclined to deny the petition (in light of the circuit conflict and the Eleventh Circuit's adherence to *Holliday*), it might also consider two other alternatives to plenary review. First, the Court might wish to consider summary reversal of the judgment below. Second, because the Director did not participate in the proceedings before the panel or in seeking en banc review below in this case, this Court might grant the petition, vacate the judgment of the court of appeals, and remand for further consideration by the panel or the en banc court. Such an order would give the court of appeals the opportunity to reconsider the matter in light of the Director's position, expressed in this brief, concerning the aberrant nature of the Eleventh Circuit's adherence to the former Fifth Circuit's decision in *Holliday*, which has been overruled by the present Fifth Circuit, and the Director's representation concerning the number of individuals in the Eleventh Circuit who are receiving permanent total disability benefits under the Act. See note 11, *supra*.

Eleventh Circuit's jurisdiction. OWCP does not compile data on the incremental costs associated with Section 10(f) adjustments.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to consider summary reversal of the judgment below, or granting the petition for a writ of certiorari, vacating the judgment of the court of appeals, and remanding the case to that court for further consideration in light of the Director's submission in this brief.

Respectfully submitted.

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